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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELBERT GARNER,

Defendant and Appellant.

B210260

(Los Angeles County
Super. Ct. No. BA339634)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Elbert Garner appeals from the judgment entered following his plea of guilty to possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)). The trial court sentenced Garner to three years in prison, suspended the sentence and granted Garner three years formal probation on the condition he serve one year in a residential treatment program. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.¹

At approximately 12:40 a.m. on April 24, 2008, Los Angeles Police Officer Gary Parker and his partner were on patrol near the intersection of Seventh and Los Angeles Streets in the city of Los Angeles. Parker first observed Garner as he was standing approximately two feet in front of a pay telephone. In his hand, Garner was holding a clear baggie. As the officers approached Garner, he looked up, saw the marked police car, stepped forward and placed the baggie on the shelf of the pay phone.

The officers got out of their patrol car, recovered the baggie from the phone booth and detained Garner. Inside the baggie were off-white solids resembling cocaine. The officers then searched Garner. In his pants pocket was a glass pipe usually used for ingesting narcotics covered with a white residue resembling cocaine base. Following the search, Garner was taken into custody.

2. Procedural history.

At proceedings held on May 8, 2008, prior to the preliminary hearing, Garner informed the trial court that he wished to represent himself. The trial court warned Garner “that self-representation is almost always an unwise choice and may not always work to [his] advantage,” “that [he would] not be helped or treated with any special leniency by [the] court or the prosecutor because” he had chosen to represent himself, that he would be “held to the same standards of conduct as an attorney[.]” and that if he chose to represent himself he could not later argue that he had made a mistake and had been represented by ineffective assistance of counsel. After Garner indicated that he had

¹ The facts have been taken from the transcript of the preliminary hearing.

previously represented himself at a jury trial, that he understood the trial court's warnings and still wished to represent himself, the trial court found that he had "voluntarily and intelligently" chosen to waive his right to counsel and proceed in propria persona.

Following the preliminary hearing, on May 22, 2008 an information was filed alleging Garner possessed cocaine base, a felony, in violation of Health and Safety Code section 11350, subdivision (a), and possessed a smoking device, a misdemeanor, in violation of Health and Safety Code section 11364, subdivision (a). It was further alleged pursuant to Penal Code sections 667, subdivisions (b) to (i) and 1170.12, subdivisions (a) to (d), the "Three Strikes" law, that Garner had previously suffered a conviction for the serious felony of robbery in violation of Penal Code section 211. Finally, it was alleged Garner had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). The trial court again asked Garner if he was certain he wished to proceed in pro per and Garner stated that he did. However, out of an abundance of caution, the trial court appointed "standby counsel."

Garner requested \$80 in funds to conduct his defense. The trial court awarded him \$40. The trial court appointed Robert L. Jones to act as Garner's investigator and indicated that it would approve funds for him to work for 10 hours. When Garner indicated he had also chosen a legal runner, Vicky McFarland Jones, the trial court ordered McFarland Jones to be Garner's legal runner. Proceedings were then continued to June 10, 2008.

At proceedings held on June 23, 2008, the prosecutor indicated that she and Garner had reached an agreement and that Garner would be changing his plea. He would plead guilty or no contest to count one, possession of cocaine base, and be sentenced to three years in state prison. The prison term would then be suspended and Garner would be placed in the "New Directions" program sponsored by the Veteran's Administration. New Directions is a live-in program which lasts for one year. Then, "with recommendations from the program and probation," Garner would be treated as an out-patient. The People agreed that they would not proceed on the "strike" and remaining

allegations. After Garner indicated that the terms of the agreement were “amenable” to him and that he wished to enter the plea, the trial court allowed the People to proceed.

After waiving his right to a jury or court trial, the right to confront and cross-examine the witnesses against him, the right to subpoena witnesses and present a defense, and the privilege against self-incrimination, Garner pleaded guilty to count one, a violation of Health and Safety Code section 11350, subdivision (a), possession of cocaine base, a felony. After Garner stipulated that there was a factual basis for his plea based on the preliminary hearing transcript, the trial court found that he had “expressly, knowingly, intelligently and understandingly waived his statutory and constitutional rights” and had “freely and voluntarily” entered the plea.

Pursuant to the plea agreement, the trial court sentenced Garner to three years in prison, suspended the sentence and granted Garner three years probation on the condition, among others, that he participate in the “New Directions” live-in program sponsored by the Veteran’s Administration. The trial court ordered Garner to pay a restitution fine of \$200 (Pen. Code, § 1202.4, subd. (b)), a stayed probation revocation restitution fine of \$200 (Pen. Code, § 1202.45), a \$20 court security fee (Pen. Code, § 1465.8, subd. (a)(1)) and a \$50 lab analysis fee (Health & Saf. Code, § 11372.5). On the People’s motion, all remaining counts and allegations were dismissed in the interest of justice (Pen. Code, § 1385).

Garner filed a timely notice of appeal and request for a certificate of probable cause on July 17, 2008. The trial court denied the request for a certificate of probable cause on August 15, 2008.

This court appointed counsel to represent Garner on appeal on October 31, 2008.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed February 13, 2009, the clerk of this court advised Garner to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied Garner's counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.